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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN M. URQUHART et al., Plaintiffs and Appellants, v. DEL MAR COUNTRY CLUB, INC., Defendant and Respondent.	D052711 (Super. Ct. No. GIC862368)

APPEAL from a judgment and order of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

The Del Mar Country Club, Inc. (DMCC) has a landscape and maintenance easement over a portion of the residential property of John M. and Kathleen J. Urquhart, and in an underlying action the parties entered into a settlement agreement that required DMCC to relinquish its interest in part of the easement, and the Urquharts to reconfirm DMCC's easement interest in the remaining portion. The agreement also required DMCC

to grant the Urquharts' son, Mark Urquhart[1], a club membership in exchange for the Urquharts' payment of $177,500 in installments, with an uncured default in any payment authorizing DMCC to cancel his membership without any right of refund.

In this action, the Urquharts sued DMCC for false promise, rescission and breach of the implied covenant of good faith and fair dealing, alleging the settlement agreement required DMCC to quitclaim to them a portion of its own property. The Urquharts appeal a summary judgment for DMCC, contending the court improperly excluded parol evidence to explain the parties' intent in negotiating the settlement, they raised triable issues of material fact, and the court erred by conditioning leave to file an amended complaint on their agreement to pay a portion of DMCC's reasonable attorney fees in bringing the summary judgment motion.

Additionally, as to the causes of action for breach of the implied covenant, the Urquharts contend the court erred by finding they lack standing to pursue claims on Mark's behalf concerning DMCC's cancelation of his membership after they defaulted on a payment, and under California law DMCC was precluded from canceling the Urquharts' membership without cause, regardless of a provision in its bylaws allowing cancelation without cause.

The Urquharts also appeal a postjudgment order awarding DMCC $779,955.97 in contractual attorney fees and other costs. We affirm the judgment and the order.

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1 When we refer to John Urquhart and Mark Urquhart individually we use their first names to avoid confusion.

FACTUAL AND PROCEDURAL BACKGROUND

DMCC owns and operates a private golf course and club in Rancho Santa Fe, California. DMCC sells memberships, or licenses, to use its facilities. Members do not obtain any proprietary or managerial interest in DMCC, and relationships between it and its members are governed by written membership agreements, by-laws, rules and regulations.

In 1996 the Urquharts purchased one of the residential lots bordering the golf course. In 1997 they paid DMCC a $75,000 initiation fee to become club members. Their membership agreement authorized DMCC to recall the membership and return their initiation fee "upon certain terms set forth in the Bylaws." The bylaws provided that DMCC reserved the right to recall any membership "at any time with or without cause, without giving any reason therefor," by returning the initiation fee. The membership agreement contained a broad attorney fees clause.

The Urquharts built a home on their lot and moved there in June 2002. In 1993 the Urquharts' predecessor in interest had granted DMCC a recorded landscape and maintenance easement over a portion of the property, and a road was constructed on the easement to provide work crews with vehicular access to the third through eighth holes of the golf course. In August 2002 the Urquharts intentionally blocked DMCC's access to the easement road by erecting an iron fence in the easement. DMCC asked them to remove the fence, but they refused.

In October 2002 DMCC filed a first amended complaint against the Urquharts to quiet title, and for trespass and related claims. The complaint prayed for a judgment

confirming DMCC's ownership of and right to use the easement, and an order requiring the Urquharts to remove the iron fence.

In January 2003 the parties entered into a Settlement and Release Agreement (hereafter settlement agreement or agreement). John, who is an attorney, negotiated the settlement with David Smith, who represented the trustees of the trust that then owned DMCC. The trustees signed the agreement for DMCC.

The settlement agreement provided that the Urquharts were to pay DMCC $177,500 in three installments as follows: $102,500 on signing the agreement, $37,500 by July 1, 2003, and the remaining $37,500 by December 31, 2004. In exchange, DMCC agreed to provide a club membership to Mark, and to credit his account "for two years of membership dues and the two-year food and beverage allowance applicable to golf members." If the Urquharts defaulted on any payment, DMCC could terminate Mark's membership unless they cured the default within 30 days of receipt of notice. If DMCC terminated Mark's membership for a payment default, the Urquharts would have no right of refund.

Further, DMCC agreed to let the iron fence stand. The settlement agreement required DMCC to deliver a quitclaim deed to the Urquharts over a portion of its easement (quitclaimed easement area), to stop driving maintenance vehicles on the easement road, and not to "construct or attempt any new access" over the quitclaimed easement area. DMCC would retain its easement rights over the remaining portion of the easement (retained easement area). Exhibit A to the agreement is a map Smith drew, which depicts the parties' abutting properties, with the golf course directly north of the

Urquhart property; DMCC's original easement over the northern portion of the Urquhart property; the iron fence, which is located within the original easement; the quitclaimed easement area, denoted as " 'Not Part of the Landscape and Maintenance Easement" '; and the retained easement area, denoted as "Remaining landscape and maintenance area for golf course use." (Exhibit A to the settlement agreement is attached to this opinion, *post*, page 31.) As the agreement required, DMCC dismissed its action with prejudice.

DMCC's ownership structure subsequently changed. In early January 2005 DMCC's new attorney delivered to the Urquharts for their signatures and recordation, two executed documents: (1) a quitclaim deed conveying DMCC's interest in the quitclaimed easement area and acknowledging its continuing interest in the retained easement area, and (2) a grant of a "perpetual, nonexclusive easement" over a portion of *DMCC's property* "for the sole purpose of accommodating [the Urquharts'] existing use of the Easement Area as a landscaped area." The settlement agreement did not mention DMCC property, and the grant of nonexclusive easement did not mention the settlement agreement. The quitclaim deed, however, provided that "Urquhart and Club hereby desire to enter into this Deed and Acknowledgment to reflect the terms of the Settlement Agreement."[2] The Urquharts, through their attorney, responded that the grant of easement was insufficient because the settlement agreement entitles them to a quitclaim deed to DMCC property, and they were withholding their final $37,500 payment for

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2 In April 2003 DMCC, through a former attorney, had sent these proposed documents or versions of them to the Urquharts.

Mark's membership because of DMCC's breach of contract. The Urquharts gave DMCC notice of rescission.

In March 2006 the Urquharts sued DMCC for rescission of the settlement agreement and restitution of consideration. The complaint alleged "DMCC tendered an unacceptable and non-complying non-exclusive easement to the property which was to have been delivered to Plaintiffs by deed." The complaint also alleged the Urquharts had performed their contractual obligations by delivering a grant of easement to DMCC for the retained easement area, and paying it $140,000 of the $177,500 settlement amount.

In July 2006 DMCC notified the Urquharts and Mark of the immediate recall of their memberships. DMCC refunded the Urquharts' $75,000 initiation fee, and they accepted and cashed the check. DMCC terminated Mark's membership on the ground his parents were in default on the final $37,500 payment and it was not cured after notice. In response, the Urquharts filed a first amended complaint (FAC) to add allegations that DMCC wrongfully terminated the memberships.

In November 2006 DMCC took John's deposition. He testified that when he negotiated the settlement of DMCC's lawsuit with Smith, among other things "[w]e agreed that I would receive a quitclaim deed to the property along the cul-de-sac, *that the country club owned*. It was outside of my property line, and that that would be a material part of the settlement agreement." (Italics added.) In January 2007 the Urquharts filed a second amended complaint (SAC), which alleged for the first time that the "property to be conveyed by deed under the Contract was property *outside* the boundary of Plaintiffs' lot, and was *property owned by DMCC*." (Italics added.)

In May 2007 the Urquharts filed a third amended complaint (TAC), the operative complaint, with causes of action for rescission (first), promissory fraud (second), and breach of the implied covenant of good faith and fair dealing (third and fourth). As incorporated into all causes of action, paragraph 20 of the TAC alleged that "[u]nder the Contract, DMCC was obligated to, among other things, execute and deliver a quitclaim deed in favor of Plaintiffs conveying all of DMCC's right, title and interest of every kind whatsoever, known or unknown, disputed or undisputed, to certain real property described in the Contract." Paragraph 21 alleged the "property to be conveyed by deed under the Contract was property *outside the boundary of Plaintiffs' lot, and was property owned by DMCC*." (Italics added.) The TAC added the allegation that "[i]nstead of delivering the required quitclaim deed, DMCC tendered an unacceptable and non-complying non-exclusive easement to the property."

The TAC's third count for breach of the implied covenant included allegations concerning DMCC's alleged breach of the settlement agreement, as described above. It also alleged DMCC wrongfully canceled the club memberships without just cause and in retaliation for this litigation. The TAC's fourth count for breach of the implied covenant pertains only to the membership agreements, and alleges they included "an implied covenant on the part of DMCC" to protect its members and not cancel membership agreements without cause and in retaliation for this litigation. The TAC prayed for a declaration of rescission, restitution of consideration, compensatory and punitive damages, and attorney fees under the membership agreements.

DMCC moved for summary judgment, or alternatively summary adjudication, of the TAC's causes of action. DMCC argued the promissory fraud claim fails because the allegation that DMCC promised to quitclaim a portion of its own property to the Urquharts is contrary to the unambiguous settlement agreement and its exhibit A, which pertain only to DMCC's easement over the Urquhart property. As to the implied covenant claims, DMCC argued it had the right to recall the Urquharts' membership with or without cause by refunding their initiation fee, the Urquharts lack standing to pursue claims on Mark's behalf, and further, the agreement authorized DMCC to terminate his membership because they defaulted on their final $37,500 payment.

In opposition to the motion, the Urquharts persisted in claiming the settlement agreement entitled them to an interest in DMCC property, but they abandoned their quitclaim theory. For the first time they argued the agreement required DMCC to convey "an *exclusive easement* to a small strip of DMCC property" rather than a quitclaim deed. (Italics added.) They noted the agreement also required DMCC to "quitclaim to the Urquharts its easement rights in part of the Urquharts' property."

John submitted a declaration that states he and Smith agreed "DMCC would quitclaim all of its interest in my property south of the Fence and Fence Prolongation"; "DMCC would have a landscape and maintenance easement over my property located north of the Fence, but would not use that easement as an access road for golf-course maintenance vehicles"; and "DMCC would convey an *exclusive* easement to my wife and me for the Proposed Easement Area, located on DMCC's property." The Urquharts

submitted additional parol evidence at variance with the terms of the settlement agreement, such as John's and Smith's deposition testimony.

DMCC objected to all parol evidence on the ground it conflicted with the plain terms of the settlement agreement, and it all went to the Urquharts' new "exclusive easement" theory, which was not alleged in the TAC.

In a tentative ruling, the court granted summary adjudication of the promissory fraud and rescission causes of action, but denied any relief on the breach of implied covenant causes of action. At the hearing, the Urquharts argued the TAC's omission of their "exclusive easement" theory was a mere "pleading defect" that could be remedied in a fourth amended complaint. The court took DMCC's motion and the Urquharts' request for leave to amend under submission.

In a November 20, 2007 order, the court found DMCC met its initial burden on the promissory fraud claim by showing the "certain real property described in the Contract," as referred to in paragraph 20 of the TAC, "was property inside (not outside) the boundary of plaintiffs' lot," contrary to the allegation in paragraph 21 of the TAC. The court cited the portion of DMCC's separate statement that discusses paragraphs 20 and 21 of the TAC, the terms of the settlement agreement, exhibit A to the agreement, and the Urquharts' admissions during discovery that the agreement contained the parties' entire agreement. The court also cited John's deposition testimony that he and DMCC "agreed that I would receive a quitclaim deed to the property along the cul-de-sac, that the country club owned. It was outside of my property line."

Despite the plain terms of the settlement agreement, which pertain only to easement over the Urquhart property, the court found the Urquharts "produced evidence that DMCC promised in the Settlement Agreement to grant an 'exclusive easement' (rather than to execute and deliver a quitclaim deed) in property *outside the boundary of plaintiffs' lot*." (Italics added.) The court cited paragraph 32 of their separate statement. It cites paragraph 20 of John's declaration, which is parol evidence and states: "In my deposition on November 13, 2006, I mistakenly interposed the words 'quitclaim deed' for the words 'exclusive easement'. . . . [M]y recollection is that, as to my property, I was to receive a release of any claim of easement. As to DMCC property, I was to receive an exclusive easement or exclusive right to use the Proposed Easement Area [DMCC property], and DMCC was to give up all right to use the Proposed Easement Area. . . . I was entitled to an *exclusive* easement and never received it."

Because the TAC did not allege an "exclusive easement" theory, however, the court determined the evidence raised no triable issue of material fact. The court also found the Urquharts raised no triable issue as to the rescission count or the third count for breach of the implied covenant because they were based on the same alleged false promise.

The court, however, granted the Urquharts leave to file a fourth amended complaint to allege DMCC's promise to grant them an "exclusive easement" over DMCC property, conditioned, however, on their agreement to "pay three-fourths the cost of the reasonable attorneys' fees incurred by defendant in preparing and arguing the [summary judgment] motion." The court determined DMCC was prejudiced by the Urquharts'

change of theory because leave to amend would delay the trial, which was set to begin in 10 days, and by moving for summary judgment based on the TAC's allegations.

The court granted summary adjudication on the fourth count for breach of the implied covenant on the ground that since under their membership agreement the Urquharts were merely licensees, DMCC could terminate their membership without cause. Further, the court found the Urquharts lack standing to pursue a claim on Mark's behalf.

The Urquharts asked DMCC's attorney for an estimate of fees for the summary judgment motion. The attorney estimated fees of $57,942.46, but cautioned that the number was preliminary. A few days later, the attorney notified them the fees would be higher. On November 30, the Urquharts filed a notice of their election not to pay any fees.

In response, DMCC requested a final order from the court. On December 7, 2007, the court issued an order granting summary judgment on the TAC. Judgment was entered on January 9, 2008. In a postjudgment order, the court awarded DMCC $720,636.85 in attorney fees as the prevailing party under the membership agreements, and $59,319.12 in other costs, for a total award of $779,955.97.

DISCUSSION

I

Summary Judgment for DMCC Was Proper

A

Inadmissibility of Parol Evidence

Preliminarily, we address the Urquharts' contention the court erred by excluding parol evidence pertaining to the settlement agreement in the underlying action. Specifically, they complain that the court did not consider John's and Smith's deposition testimony that when they negotiated the settlement they intended that an element was DMCC's conveyance of an interest in a small piece of its own property to the Urquharts. DMCC counters that the evidence is inadmissible because it contradicts the plain terms of the settlement agreement. We agree with DMCC.

"A contract must be interpreted to give effect to the mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone." (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 473.)

"[P]arol evidence is properly admitted to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' " (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, citing *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37 (*Pacific*

Gas). Admissible parol evidence "includes testimony as to the 'circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . .' so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.' " (*Pacific Gas, supra,* at p. 40; *Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552.)

"The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step — interpreting the contract." (*Winet v. Price, supra,* 4 Cal.App.4th at p. 1165.) "If . . . in the light of . . . extrinsic evidence, the provisions of the [contract] are not reasonably susceptible of two or more meanings, there is no uncertainty arising upon the fact of the [contract] [citations] and any proffered evidence attempting to show an intention *different* from that expressed by the words therein, . . . is inadmissible." (*Estate of Russell* (1969) 69 Cal.2d 200, 212.)

"The trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. [Citation.] Thus the threshold determination of ambiguity is subject to independent review." (*Winet v. Price, supra,* 4 Cal.App.4th at p. 1165.)

We conclude the settlement agreement is not susceptible to the meaning the Urquharts urge. The agreement does not even mention DMCC's property. It states the subject of the agreement is DMCC's first amended complaint against the Urquharts to quiet title and for other relief, which action pertained only to DMCC's easement over the Urquhart property. Part III, Nos. 5 and 6 of the agreement, the only paragraphs that describe the property at issue, clearly belie the Urquharts' position. They provide:

> "5. [DMCC] will execute and record a Quit Claim Deed in favor of the [Urquharts] conveying all of [DMCC's] right, title, and interest of every kind whatsoever, known or unknown, disputed or undisputed, to the real property currently bounded by the iron fence and *designated as 'Not Part of the Landscape and Maintenance Easement' on the attached exhibit 'A*.'
>
> "[DMCC] will continue to maintain the area of the Urquhart Property designated on the exhibit as the landscape and maintenance easement for use in the operation of the golf course, consistent with its current use (and not as a road for maintenance crews). The portion *of the [Urquharts'] property* shown on the attached exhibit as 'Not Part of the Landscape and Maintenance Easement' is excluded from the Remaining Landscape and Maintenance Easement. [The Urquharts] will not interfere with the Remaining Landscape and Maintenance Easement and will confirm in a recorded document, [DMCC's] easement rights over the Remaining Landscape and Maintenance Easement.
>
> "6. Consistent with the last two paragraphs, [DMCC] will no longer use the road located *within the easement area* for maintenance vehicles to access the golf course. Instead, [DMCC] will construct alternative access or use other access points currently in existence, but [DMCC] will not construct or attempt any new access over the real property currently bounded by the iron fence and designated as 'Not Part of the Landscape and Maintenance Easement.' " (Italics added.)

The Urquharts assert that since the first sentence in part III, No. 5 required DMCC to quitclaim its "right, title, and interest of every kind whatsoever," the settlement agreement "was intended to cover all the possibilities — including ownership by DMCC, easement by DMCC or any other possibility." The Urquharts submit that "[b]y requiring

only that DMCC convey a quitclaim deed, the parties, by implication, understood that no specific determination of what, if anything, belonged to whom as to the small piece of land."

The Urquharts, however, ignore the language of part III, No. 5 that belies their position. The parties' intention must "be derived from the language of the entire contract." (*City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 382.) "We must view the language of a contract as a whole, avoiding a piecemeal . . . approach. If possible, we should give effect to every provision and avoid rendering any part of an agreement surplusage." (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633.)

The first sentence of part III, No. 5 of the settlement agreement states the property to be quitclaimed is property "currently bounded by the iron fence and designated as 'Not Part of the Landscape and Maintenance Easement' on the attached exhibit 'A.' " The second paragraph states the "portion of the [*Urquharts'*] *property* shown on the attached exhibit as 'Not Part of the Landscape and Maintenance Easement' is excluded from the Remaining Landscape and Maintenance Easement." (Italics added.)

Further, the drawing attached to the settlement agreement as exhibit A cannot reasonably be interpreted to mean DMCC owns any of the land designated as "Not Part of the Landscape and Maintenance Easement." Exhibit A shows an area bounded by bold black lines demarcating an "Easement boundary" within the Urquhart property, with the quitclaimed easement area entirely within the easement and the "Golf Course" to the north of the easement.

The Urquharts concede that the settlement agreement embodies the parties' entire agreement. "[U]nder the parol evidence rule, all prior or contemporaneous 'oral negotiations are merged in the written contract, which is conclusive in the absence of a plea of actual fraud or mistake.' [Citation.] The written agreement supersedes these negotiations and becomes the parties' sole agreement [citation], and extrinsic evidence may not 'add to, detract from, or vary the terms of' that agreement [citation]. As such, the rule 'applies to any type of contract, and its purpose is to make sure that the parties' final understanding, deliberately expressed in writing, shall not be changed.' [Citation.] [¶] Thus, the parol evidence rule . . . does not merely serve an evidentiary purpose; it determines the enforceable and incontrovertible terms of an integrated written agreement." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 345.)[3] The parol evidence rule is based "on the assumption that written evidence is more accurate than human memory," and "on the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 227.)

The trustees of the trust that previously owned DMCC signed a settlement agreement that unambiguously obligated DMCC to relinquish its rights to a portion of the

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3 Civil Code section 1625 provides: "The execution of a contract in writing . . . supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Code of Civil Procedure section 1856, subdivision (a), provides: "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."

easement over the Urquhart property, the quitclaimed easement area. The document does not suggest they agreed to convey any portion of DMCC property to the Urquharts, and accordingly, extrinsic evidence to the contrary is inadmissible as a matter of law.

The trial court did erroneously admit some parol evidence. It relied on paragraph 20 of John's declaration in conditionally granting the Urquharts leave to file a fourth amended complaint to allege DMCC was required to convey an "exclusive easement" to its own property. The court declined to rule on the admissibility of other parol evidence because it all went to the "exclusive easement" theory, which was not pleaded in the TAC, and thus it could not raise a triable issue of material fact.

B

No Triable Issue of Material Fact

1

Standard of Review

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A defendant moving for summary judgment satisfies its burden of showing a claim lacks merit if the defendant can show one or more elements of a cause of action cannot be established because the plaintiff does not possess and cannot reasonably obtain the evidence necessary to establish the claim, or a complete defense to that cause of action exists." (*Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47, 54.) "If

this burden of production is met, the burden shifts to the plaintiff to set forth specific facts sufficient to establish a prima facie showing of the existence of a triable material issue of fact." (*Ibid.*) We independently review the ruling on a motion for summary judgment. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.)

2

False Promise and Related Counts

The Urquharts contend the court misidentified the false promise as alleged in the TAC, and that caused it to find they raised no triable issue of material fact as to the TAC's first through third causes of action. They assert that DMCC's false promise was not necessarily to quitclaim DMCC property to them, as the court found. Rather, the false promise was DMCC's promise to quitclaim whatever interest it has in the property to them.

The Urquharts cite paragraph 20 of the TAC, which alleged that "[u]nder the Contract, DMCC was obligated to . . . execute and deliver a quitclaim deed in favor of Plaintiffs conveying all of DMCC's right, title and interest of every kind whatsoever, known or unknown, disputed or undisputed, to certain real property described in the Contract." They submit that since paragraph 20 does not specify the owner of the property to be quitclaimed, either DMCC or the Urquharts could own it. Thus, they say, DMCC did not show entitlement to summary judgment by showing the settlement agreement pertains only to property within the Urquhart easement.

Paragraph 21 of the TAC, however, alleges: "The property to be conveyed by deed under the Contract was property *outside the boundary of Plaintiffs' lot, and was*

property owned by DMCC." (Italics added.) The Urquharts now assert paragraph 21 "was unnecessary surplusage and should have been ignored by the trial court. It is nowhere in the Settlement Agreement at issue. Proving it false or unproven is irrelevant to the claim before the court. Only by combining paragraph[s] 20 and 21 . . . and then incorrectly assuming that was the promise in the contract could the trial court grant the Motion. In short, [DMCC] merely convinced the court that DMCC did not own the property and therefore paragraph 21 of the [TAC] was disproved. However, since the fact of ownership was not part of the 'false promise,' it is irrelevant to the causes of action based upon that 'false promise.' " (Italics and boldface omitted.)

The Urquharts waived appellate review of this argument by not raising it in their opposition to DMCC's motion. To the contrary, they argued DMCC falsely promised to grant them an "exclusive easement" over a portion of its own property, shifting from their original theory that DMCC falsely promised to deliver a quitclaim deed to its own property. In their separate statement, they agreed it is undisputed that they "contend that 'the property to be conveyed by deed under the Contract was property outside the boundary of Plaintiffs' lot, and was property owned by DMCC.' " Further, John's declaration states DMCC was to "convey an *exclusive* easement to my wife and me" to DMCC's own property, "an *exclusive* easement was of particular significance," and "[t]o date, I have not received from DMCC an exclusive easement." " 'A party is not permitted to change his [or her] position and adopt a new and different theory on appeal. To permit him [or her] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' " (*In re Marriage of Eben-King & King* (2000) 80

Cal.App.4th 92, 110-111.) It is too late for the Urquharts to argue they could own the property in dispute. The pleadings and the record clearly show this action is based exclusively on their claim of entitlement to a piece of DMCC property.

Further, we cannot ignore paragraph 21 of the TAC. " 'The function of the pleadings in the motion for summary judgment is to delimit the scope of issues . . . .' [Citations.] The complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381; *Government Employers Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.) On appeal, we "apply the same three-step analysis required of the trial court. ' " 'First, we identify the issues *framed by the pleadings since it is these allegations to which the motion must respond*[.] . . . [¶] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor. . . . [¶] When a summary judgment prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of a triable, material factual issue.' " [Citations.]' " (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503, italics added.)

DMCC showed entitlement to judgment as a matter of law by showing the settlement agreement contains no promise by DMCC to convey its own property to the Urquharts. The burden shifted to the Urquharts to raise a triable issue of material fact, but they did not do so. Indeed, they could not do so because the agreement is not susceptible to the interpretation that DMCC agreed to convey its own property to them,

whether by quitclaim deed or an exclusive easement. The court eventually ruled correctly, but by considering John's declaration and conditionally granting the Urquharts leave to file an amended complaint to allege their theory that DMCC promised them an "exclusive easement" to DMCC property, rather than a quitclaim deed to DMCC property, the court unnecessarily delayed the matter.

We may affirm a trial court's ruling granting summary judgment if it is proper under any theory of law applicable to the case. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 526; *Paduano v. American Honda Motor Co., Inc.* (2009) 169 Cal.App.4th 1453, 1463.) We affirm the court's ruling on the first through third causes of action.[4]

3

Breach of Implied Covenant

The Urquharts also contend the court erred by granting summary judgment on the TAC's third cause of action for breach of the implied covenant of good faith and fair dealing, because it contains allegations pertaining to both the settlement agreement and the membership agreements, and the court's ruling does not address the membership

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4 The Urquharts challenge the propriety of the conditional nature of the court's ruling on their request for leave to file a fourth amended complaint to add allegations pertaining to their "exclusive easement" theory. They contend the court did not follow the procedure it announced, and assert that DMCC was required to provide them with a reasonably certain statement of their fee obligation *before* they had to decide whether to agree to pay the fees. They also characterize the summary judgment as a "terminating sanction" and assert they should have been afforded a separate hearing on the matter. Even if there was any error, however, the Urquharts, were not prejudiced as an amended complaint to allege an "exclusive easement" in DMCC property would not change the ultimate outcome.

agreements. (See Code Civ. Proc., § 437c, subdivision (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."].) The court's December 7, 2007 ruling, however, does address the membership issue in the third cause of action. The order states, "like the fourth cause of action, the third cause of action alleges that DMCC cancelled Plaintiffs' and Mark Urquhart's memberships without cause," and the court's November 20, 2007 ruling as to the fourth cause of action, also for breach of the implied covenant arising from the membership agreements, disposed of the matter.

Additionally, the Urquharts challenge the court's finding they lack standing to pursue claims on Mark's behalf for DMCC's cancelation of his membership. They claim they have standing because Mark's membership was consideration for their payment of $177,500 to DMCC under the settlement agreement. Even if they have standing, however, DMCC was entitled to summary judgment because the agreement authorized it to cancel Mark's membership if they defaulted on any of their payments. It is undisputed that they did not pay the final installment of $37,500 on the theory DMCC's breach of the settlement agreement excused the payment. The excuse defense lacks merit, however, because the settlement agreement did not require DMCC to convey any interest in its own property to them.

Further, the Urquharts contend the court erred by granting summary judgment on the fourth cause of action after finding *Youngblood v. Wilcox* (1989) 207 Cal.App.3d 1368 (*Youngblood*) distinguishable. In *Youngblood*, the plaintiffs had purchased a

"lifetime membership" in a golf club. (*Id.* at p. 1371.) After a dispute arose between them and the club, the club sent them notice of termination of their memberships. The members sued for breach of contract and related counts, and for injunctive relief. The appeal was of a preliminary injunction restraining the golf club from interfering with their rights as lifetime members pending resolution of the litigation. (*Id.* at p. 1372.) The Court of Appeal held the trial court did not abuse its discretion by finding a likelihood the members would prevail on the merits. (*Id.* at p. 1375.) The court explained that although the club's bylaws stated it could terminate a membership at will, " '[i]n this state, "a member of an *unincorporated association* may not be suspended or expelled . . . without charges, notice and a hearing, even though the rules of the association make no provision therefor." [Citations.] [Citation.]' [Citation.] 'The requirements of notice, hearing and a fair trial antecedent to expulsion are so fundamental that they are imposed *upon an association* such as here under discussion even though its own constitution, charter, or rules fail to make such provisions. [Citations.]' " (*Ibid,* italics added; see also *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1066 ["The purpose of the common law right to fair procedure is to protect, in certain situations, against arbitrary decisions by private organizations."].)

The court found *Youngblood* distinguishable on the ground that members of DMCC are not members of an association, but merely licensees entitled to use the facilities. DMCC's bylaws state it 'has been formed to permit its members and their guests to utilize the golf course, clubhouse, tennis facilities and other recreational facilities." The bylaws define "Member" as a "person given rights as a licensee to use the

facilities of the Club under an accepted Membership Application, these Bylaws and the Rules and Regulations." Further, the membership agreements state the applicant agrees he or she obtains no proprietary or managerial interest in DMCC. Similar facts do not appear in *Youngblood*, and further, DMCC's members are not lifetime members.

The Urquharts do not assert *Youngblood* applies to their membership agreement. They assert only that since Mark's membership agreement was part of the consideration for the settlement agreement, "the granting of [his] membership was more than a mere license." The Urquharts, however, cite no supporting legal authority, and develop no argument pertaining to the nature of a license to use a for-profit business's facilities versus the nature of a lifetime membership in a trade, business or social association. "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) We decline to extend *Youngblood* without a persuasive argument and supporting authority.

Summary judgment for DMCC was proper.

II

Contractual Attorney Fees

A

DMCC sought attorney fees pertaining to the membership agreements, "for all work that cannot reasonably be apportioned between fee claims and non-fee claims," and for "work on issues that are relevant to both fee and non-fee claims." In its ruling, the court explained the Urquharts did not contest that DMCC is the prevailing party on the

membership agreements, the attorney fees clauses "are broad enough to include attorneys' fees incurred defending against tort causes of action," the causes of action in the FAC, the SAC and the TAC "share common legal and factual issues regarding the membership agreements," and "[u]nder these circumstances, the Court cannot apportion the claimed attorneys' fees."

The Urquharts contend the court erred by not apportioning attorney fees among contract and non-contract causes of action. They concede attorney fees are proper as to the two causes of action for breach of the implied covenant, but argue fees are unavailable for the rescission and promissory fraud claims as they are tort claims.[5]

"Code of Civil Procedure section 1021 provides the basic right to an award of attorney fees. [Citation.] It states: 'Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.' Under this statute, the allocation of attorney fees is left to the agreement of the parties. There is nothing in the statute that limits its application to contract actions alone. It is quite clear from the case law interpreting Code of Civil Procedure section 1021 that parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between

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5 Rescission is actually a contract-based remedy for fraud. "It is well established that where the plaintiff contracts in reliance upon the fraud of the defendant, he may elect either the contract remedy, consisting of restitution based in rescission or the tort remedy, by affirming the contract and seeking damages." (*Star Pacific Investments, Inc. v. Oro Hills, Ranch, Inc.* (1981) 121 Cal.App.3d 447, 461.)

themselves, whether such litigation sounds in tort or in contract." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341 (*Xuereb*).) In *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (*Santisas*), the court cited *Xuereb* for the proposition that "[i]f a contractual attorney fee provision is phrased broadly enough, . . . it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims."

In *Xuereb,* the attorney fees clause provided the "prevailing party would recover its attorney fees and costs in any 'lawsuit or other legal proceeding' to which 'this Agreement gives rise.' " (*Xuereb, supra,* 3 Cal.App.4th at p. 1342.) The court held that language "does not limit an award of attorney fees to actions brought on a breach of contract theory, or to actions brought to interpret or enforce a contract. . . . The language is broad enough to encompass both contract actions and actions in tort." (*Id.* at pp. 1342-1343.)

In *Santisas,* the attorney fees clause provided: " 'In the event legal action is instituted by the Broker(s) or any party to this agreement, or arising out of the execution of this agreement or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought.' " (*Santisas, supra,* 17 Cal.4th at p. 603.) The court held that "[o]n its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims 'arising out of the execution of th[e] agreement or the sale." (*Id.* at p. 608; see also *Thompson v. Miller* (2003) 112

Cal.App.4th 327, 336 [phrase "any dispute under the agreement" broad enough to encompass tort claims].)

Here, both the membership agreements provide: "In the event of *any legal action* between the parties *regarding the subject matter of this Agreement*, the prevailing party shall be entitled to reasonable attorneys' fees in addition to court costs and other expenses incurred in said legal action, regardless of whether such legal action is prosecuted to judgment." (Italics added.) We conclude that as a matter of law, this clause is broad enough to encompass tort claims that pertain to the subject matter of the membership agreements.

The Urquharts submit that the TAC's rescission and promissory fraud claims concerned only whether DMCC was required under the settlement agreement to convey an interest in its own property to them. However, allegations pertaining to the membership agreements permeate the rescission claim, and the allegations are all incorporated in the promissory fraud claim. For instance, those claims allege the Urquharts' final payment of $37,500 for Mark's membership was excused by DMCC's breach of the settlement agreement, and the termination of Mark's membership was in bad faith and in conscious disregard for his membership rights. Further, those claims allege "DMCC, also as a retaliatory measure, in July, 2006, unilaterally and without cause terminated Plaintiffs' own membership in DMCC. This termination was a substantial and intentional violation of DMCC's duty of utmost good faith to its members." The claims allege that "[a]s a result of the foregoing," including the membership terminations, the Urquharts were entitled to rescission of the settlement

agreement. The TAC's shotgun approach put the validity of the membership agreements and DMCC's termination of them at issue in each cause of action.

Moreover, the court's ruling was proper even without considering the breadth of the attorney fees clause. "[F]ees need not be apportioned when incurred for representation on an issue common to both causes of action in which fees are proper and those in which they are not. [Citation.] Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units." (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687 (*Bell*).) Upon determining a right to attorney fees, "apportionment of fees and costs similarly rests within the sound discretion of the trial court. [Citations.] ' "A trial court's exercise of discretion is abused only when its ruling ' " exceeds the bounds of reason, all of the circumstances before it being considered." ' [Citations.]" ' " (*Ibid.*) Here, there were common claims pertaining to the settlement agreement and the membership agreements throughout the TAC and the claims for relief were, at least to some degree, inextricably intertwined. We find no abuse of discretion.

The Urquharts cursorily assert that based on the billings, the court could have apportioned attorney fees. They fail, however, to develop any particular argument or cite the appellate record. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769.) Accordingly, where a party provides a brief without "argument [or] . . .

record reference establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)[6]

B

Additionally, the Urquharts claim the court abused its discretion by awarding excessive attorney fees.[7] They assert that an award of "almost $800,000 on a dispute over a tiny piece of property" is unreasonable, and "[s]imple justice requires intervention by this court." They complain that the court awarded DMCC the full amount of its fee request, and it "included multiple attorneys and firms billing up to $700/hr." DMCC counters that the Urquharts used "scorched-earth" litigation tactics that drove costs up, and defense of the action was especially important because they "went so far as to challenge the validity of DMCC's contractual right to recall memberships under the membership agreements applicable to every member."

The fees do appear rather astounding, given the limited issues, most of which were legal ones based on contract interpretation. The Urquharts, however, waived appellate

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6 Further, the Urquharts' reliance on *Bell* is misplaced as it is factually distinguishable. In that case, only four of the complaint's 15 causes of action pertained to an alleged violation of the Brown Act, under which statutory attorney fees were awarded. (*Bell, supra,* 82 Cal.App.4th at p. 687.) This court found the Brown Act claims and the tort claims for such things as wrongful termination "constitute two separate and distinct claims, one entitled to statutory fees and the other not." (*Id.* at p. 688.)

7 We note that DMCC did not request any attorney fees related to the Urquharts' original complaint, which was filed before it terminated the membership agreements and contained no allegations related thereto. DMCC requested fees from the time they filed the FAC.

review of the excessiveness issue by not raising it at the trial court. (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 494.) The court's order states: "Defendant has established $720,636.85 is a reasonable amount for attorneys' fees. Plaintiffs do not challenge the rates of, or the time expended by, defendant's attorneys."

DISPOSITION

The judgment and the order on attorney fees are affirmed. DMCC is entitled to costs on appeal.

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MCCONNELL, P. J.

WE CONCUR:

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O'ROURKE, J.

_____

AARON, J.

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JULY 31, 2002

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